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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 619

ZAREH NUBAR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The brief of the respondent in opposition to the petition for a writ of certiorari herein contains erroneous and misleading statements of such importance as to require the filing of a reply brief on behalf of the petitioner. These will be discussed in the order in which they appear in the respondent's brief.

I

The Residence Issue

1. Respondent states (Br. 6) that "There is no real question that the result below is fully in accord with the Regulations." Nothing could be more inaccurate. There is absolutely nothing in the Regulations which defines a sojourn within the United States made necessary by war

time conditions as constituting residence for Federal income tax purposes. The Regulations are completely silent on this matter just as were the regulations considered by this Court in *McGrath* v. *Kristensen,* 340 U. S. 162. The provision of the Regulations relied on by the respondent in his brief has nothing to do with the consequences of an enforced stay and deals only with the residence status of an alien who voluntarily *comes to the United States* for a purpose of such a nature that an extended stay is necessary for its accomplishment. Such provision of the Regulations has no bearing on the instant case, not only because it does not deal with the consequences of an enforced stay, but also because the petitioner herein *came to the United States* for admittedly temporary purposes of such a nature that they might be promptly accomplished (R. 11).

2. The error committed below was not that of the Tax Court in confusing the terms "domicile" and "residence" (Br. 8), but that of the Court of Appeals in failing to apprehend the significance of the volitional element which is basic to residence in whatever statute the term may be found. Whatever remarks the Court of Appeals may have made concerning the theory of residence applied by the Tax Court, it is unmistakably clear that the Court of Appeals itself was confused as to the essential meaning of the term "residence."

3. With the principle cited by respondent (Br. 8) that the purpose of the revenue laws is to put money into the federal treasury, there can be no quarrel. Such principle, however, is clearly no justification for the distortion of accepted principles of law applicable to the concept of residence. That hard cases make bad law was never more clearly illustrated than in the instant case. In the March 1951 issue of the Columbia Law Review, in an article entitled *"The Residence Concept and Taxation of Foreign Income"* (51 COLUMBIA L. REV. 378), it is stated (pp. 384, 385) that *"In the Nubar case, the court achieved the desired result by a strong-arm application of the residence*

concept," and the article forecasts that *"In view of the absence of any of the usual indicia of residence in the war enforced stay situation, it will not be surprising if the Nubar decision is not followed."* (italics added). The decision in the instant case clearly warrants this adverse criticism.

4. Respondent's contention (Br. 9) that the record falls short of establishing that petitioner was under constraint is clearly without foundation. As indicated in the petition herein (p. 4), the constraint was of two types: (1) inability of the taxpayer to return to his home in Europe due to war conditions, and (2) inability under the immigration laws to remain in the United States beyond the period necessary for enforcement of the orders of arrest and expulsion. Either type of constraint would have prevented the petitioner from exercising the free choice and free will essential to establishing a residence in the United States.

The respondent does not even attempt to deny that constraint of the second type existed and the record admits of no such denial. The Court of Appeals in the *Kristensen* case (179 F. 2d 796) expressly based its decision both on the ground of the alien's inability to return to his home in Europe and on the ground that the alien was subject to an order of arrest and deportation. As the Court of Appeals said in that case (p. 801), when the "deportation warrant issued against him, any prospect of his stay developing what it lacked, the limited degree of permanence required for residence, was foreclosed to him." Moreover, if the petitioner in the instant case had remained continuously at Ellis Island throughout this period, surely no one would contend that he had become a resident of the United States. When he was released on bond and "thereby [his] prison bounds were enlarged * * *, the nature of [his] stay within the territory was not changed. [He] was still in theory of law at the boundary line and had gained no foothold in the United States" (Mr. Justice Holmes in *Kaplan* v. *Tod*, 267 U. S. 228, 230).

In addition, the findings of the Tax Court clearly establish a case of constraint of the first type through petitioner's inability to return to his home in Europe. The Tax Court specifically found that "war time conditions made his return to either France or Switzerland either impossible or hazardous" (R. 21) and found further that petitioner "remained in the United States after January 15, 1941, because of the obstacles which war time conditions put in the way of his leaving this country" (R. 22).[1] A clearer finding of constraint would be difficult to imagine. The instant case is squarely within the pattern of the *Kristensen* and *Neuberger* cases.

5. Respondent's allegation (Br. 10) that the findings of the Court of Appeals "were no more than paraphrases of the findings of the Tax Court" is a gross misstatement. Contrast the findings of the Tax Court quoted above with the finding of the Court of Appeals (R. 50) that the petitioner's original temporary purpose in coming to the United States "was superseded after the war had commenced and travel had become difficult and dangerous by the purpose to remain in the country until after the war." Further evidence that the Court of Appeals was making its own *de novo* findings of fact is found in its conclusion that the petitioner's purpose changed "after the war had commenced", i.e., in *September 1939*, to a purpose to remain in the United States for the duration of the war. Contrast with this the Tax Court's finding that when the petitioner sought to enter Mexico in *April 1940*, it "was petitioner's intention then not to return to the United

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[1] In *J. H. Marsman*, T. C. Memo. Dec. Docket Nos. 18590, 18591 (1950 P-H T. C. Memo. Dec., Par. 50,038), the Tax Court distinguished its own *Nubar* decision by stating that "the petitioner in that [Nubar] case had the intention to leave the United States but was prevented by restrictions on travel." Apparently the same ground served as a distinction between the Tax Court *Nubar* decision and the later case of *Ceska Cooper*, 15 T. C. 757, reviewed by the Tax Court *en banc*.

States" (R. 12). Contrast as well the findings of the Tax Court as to petitioner's efforts to go to France and Switzerland in 1940 and 1941 (R. 12, 13).[2]

The Tax Court was fully aware of the fact that petitioner in 1939 had requested an extension of stay for "one year or the end of the war" (R. 13).[3] It obviously considered that if any adverse inference were to be drawn therefrom, it was heavily outweighed by the vast amount of evidence, documentary and otherwise, indicating that petitioner desired, intended and attempted to leave the United States (R. 11-13). It was not within the power of the Court of Appeals which did not see or hear the witnesses to adopt, on the basis of an isolated piece of evidence, a different construction of the facts.

6. *Finally, but most important, the Court of Appeals in its opinion gave express approval to the erroneous doctrine that a person unable to leave the United States must be deemed to intend to remain in the United States and thereby becomes a resident (R. 50).* This concept directly conflicts in principle with the *Kristensen* and *Neuberger* cases (Pet. 11).

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[2] It is true that petitioner made no further efforts to leave after August 1941, but after that date the theatre of war steadily expanded and the visa and other travel difficulties increased enormously. Even the immigration authorities found it impossible or impracticable to deport petitioner (R. 21). Many other aliens were similarly stranded (see Pet. 3, fn. 1). The Tax Court was fully justified in finding that petitioner desired to leave but was unable to do so.

[3] Petitioner had not at that time completed his temporary purposes in coming to the United States. His subsequent actions in attempting to continue on to Central and South America and thereafter in attempting to return to Europe and his oft expressed statements of intention clearly negatived, the Tax Court found, any contrary inference to be drawn from the 1939 statement.

II

The Doing Business Issue

This point requires only a brief reply. Respondent does not even attempt to refute the arguments of petitioner as to the construction of Section 211(b) (Pet. 11-13). We need only add therefore that if Congress had intended to exclude nonresident aliens physically present in the United States from the coverage of the Section, it would have been an easy matter to do so. It knew that in ordinary and in legal parlance the term "nonresident alien" includes such aliens. Its failure to exclude them leaves no room for the construction adopted by the Court below.

No sound reason exists why the *Higgins* doctrine which has already been applied by the Circuit Courts under sections of the Code other than 23(a) should not also apply under Section 211(b). To so apply it is in no way derogatory of the exclusion now found in Section 211(b) relating to transactions with resident brokers since such provision was inserted in the statute long before the *Higgins* doctrine was promulgated by this Court and at a time when it was thought that even personal investment activities of the sort engaged in by Higgins might constitute engaging in trade or business.

As to the scope of the *Higgins* doctrine, it is noteworthy that in one paragraph (Br. 13), respondent cites cases indiscriminately, both those arising under Section 23(a) of the Code and those arising under other sections of the Code, to prove that speculation in securities for one's own account may constitute engaging in trade or business under Section 211(b). In the next paragraph, he contends that the cases cited by petitioner holding that such speculation does *not* constitute engaging in trade or business under Sec-

tion 23(a) are not in point under Section 211(b). The fact is that the Circuit Court decisions on this point are clearly in conflict, as respondent in effect concedes (Br. 13), and the conflict is one which this Court should resolve.

Respectfully submitted,

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